

EPA Codifies AAI Rule

Today's edition of the *Federal Register* contains the final "All Appropriate Inquiries" rule (40 CFR Part 312) that was signed by U.S. EPA Administrator Stephen L. Johnson on Friday, October 21, 2005. Publication of the final rule ends nearly one year of waiting for EPA's response to the more than 400 public comments received on the proposed rule. Now, environmental professionals, lenders, developers, investors and other interested stakeholders have the information necessary to prepare for the transition to the first federal environmental due diligence rule.

In an analysis of the public comments received last fall on the proposed rule (*2005 Public Comments Scorecard on the AAI Rule*, May 2005), EDR developed an "Opposition Quotient" for individual components of the rule. The accompanying graph ranks the most contentious aspects of the rule. The final rule—and its lengthy preamble—contains EPA's answers to the questions raised in each of these areas, including:

- What qualifications must be met by the environmental professional doing the Phase I?
- Does the visual site inspection have to be conducted by someone who meets these professional qualifications?
- Can a previously-conducted Phase I ESA be relied upon?
- Can a Phase I ESA prepared for one client be transferred to another party seeking CERCLA liability protection?

- Is sampling required under the AAI rule?
- Do neighboring property owners have to be interviewed?
- How far back in time must the environmental professional go in conducting historical research?
- What role will ASTM's E 1527 standard have after the AAI rule takes effect?
- How much research is sufficient to satisfy AAI?
- How does a Phase I professional account for gaps in the property's history that cannot be filled?
- Has EPA revised its Economic Impact Analysis which estimates a price increase of \$41 to \$47 per assessment?

Phase I ESAs and "Continuing Obligations"

In both the preamble to the proposed rule and at various conferences, EPA has taken a strong position that the 2002 Brownfields Law imposes obligations on the owner over the course of property ownership, not just during the pre-transaction environmental due diligence. The new emphasis on "continuing obligations" also puts more pressure on property purchasers—and their environmental professionals—to conduct thorough Phase I ESAs to identify upfront what the owner must do to preserve CERCLA liability protection. In some states, there is already case law on the books against companies that failed to meet their continuing obligations and forfeited their CERCLA liability protection as a result. Moreover, ASTM just appointed a new task group to write a guidance document for meeting these new requirements. This emphasis on the steps a property owner must take after purchase (e.g.,

STATUS REPORT ASTM's AAI Response

Publication of New E1527-05 Standard

Ending two years of collaboration with the U.S. Environmental Protection Agency (EPA), ASTM just published a revision to the E1527-00 standard that satisfied the agency as being at least as stringent as the federal AAI rule. On the rule's effective date of November 1, 2006, persons seeking CERCLA liability protection may use the procedures of ASTM International Standard E1527-05 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" to comply with the requirements of AAI (§ 312.11 References). The revised standard incorporates the contentious definition of "environmental professional (EP)," certain changes to minimum search distances for government records reviews, clarifications of users' responsibilities, data gaps language, interview requirements and other revisions necessary to bring the standard in line with the new federal requirements. To obtain a copy of the new standard, visit www.edrnet.com/aa1 for a link to ASTM's web page on E1527-05. ■

**AAI Final Rule Codified on
November 1, 2005**

Environmental due diligence is on the brink of change. Some subtle. Others more substantive. The changes stem from EPA's mandate pursuant to the January 2002 Small Business Liability Relief and Revitalization Act (the Federal Brownfields Law) to write the nation's first federal standards for conducting "All Appropriate Inquiries," the process by which a property's potential for environmental contamination is investigated prior to purchase. Congress laid out a 10-step framework for what constitutes AAI (see Table 1 on p. 2), and gave EPA two years to write the regulation (by January 11, 2004).

On November 14, 2003, after more than 100 hours of discussion and debate, the reg-neg committee reached consensus on a draft rule for the first federal standards and processes for conducting AAI. The final consensus draft rule—to be eventually codified in federal regulation, "*Part 312 - Standards for Conducting All Appropriate Inquiries*"—follows the ASTM E 1527-00 standard in many areas, but it does add certain new levels of investigation (see Table 2 on p. 3). This article covers 10 key facts about the draft AAI rule (see sidebar), including its applicability, requirements for Phase I professionals, and its most notable differences with current industry practice.

liability down the road. Since 1986, CERCLA has provided property owners with the "innocent landowner defense," which can protect an owner from cleanup liability for pre-existing contamination if the owner conducted AAI "into the previous ownership and uses of the property" prior to purchase, and if the results did not reveal the presence of contamination. The conduct of Phase I environmental site assessments is now institutionalized in commercial real estate transactions using ASTM Standard Practice E 1527 for Phase I Environmental Site Assessments (the most recent revision is ASTM E 1527-00). The standard was developed to



permit a property owner to qualify for the "innocent landowner defense" to CERCLA liability.



Along came the Federal Brownfields Law in 2002, which not only amended the "innocent landowner defense" but, in an attempt by Congress to mitigate obstacles to brownfields redevelopment, added two new landowner liability protections as follows:

cases. Under the Federal Brownfields Law, owners of any residential property used for commercial purposes (irre-

spective of the number of units), as well as residential properties under government ownership, will be required to conduct a Phase I under the AAI rule in order to be protected from CERCLA liability. Moreover, AAI will be mandatory for all grantees whose environmental inquiries are funded under EPA's brownfields program.

1. The results of an inquiry by an environmental professional.
2. Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
3. Reviews of historical sources, such as chain of title documents, aerial photographs, building department records and land use records, to determine previous uses and occupancies of the real property since the property was first developed.
4. Searches for recorded environmental clean-up liens against the facility that are filed under federal, state or local law.
5. Reviews of federal, state and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal and spill records concerning contamination at or near the facility.
6. Visual inspections of the facility and of adjoining properties.
7. Specialized knowledge or experience on the part of the defendant.
8. The relationship of the purchase price to the value of the property, if the property was not contaminated.
9. Commonly known or reasonably ascertainable information about the property.
10. The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

**Table 2. Comparison Between
ASTM E 1527-00 Standard and Draft AAI Rule**

ASTM E 1527-00 Standard		Draft AAI Rule
Innocent landowner defense	Which CERCLA Defense(s)?	Innocent landowner defense Bona fide prospective purchaser defense Contiguous property owner defense
Limited to commercial real estate, excluding those for residential use with no more than four units.	Applicability to what types of properties?	Commercial real estate Residential properties used for commercial purposes (any number of units) Residential properties under government ownership
Identify recognized environmental conditions (RECs)	Objective of the assessment or inquiry?	Identify conditions indicative of releases or threatened releases.
CERCLA hazardous substances and petroleum products	What are the contaminants of concern?	- <u>3 CERCLA defenses</u> : CERCLA hazardous substances only - <u>EPA grantees</u> : CERCLA hazardous substances, petroleum/petroleum products, and controlled substances.
Broad definition	Who is qualified to perform assessments/inquiries?	Specific requirements for: Education Relevant experience License/registration/certification
User	Responsibility for searching records of engineering and institutional controls?	Environmental professional (if sources are "reasonably ascertainable")
Federal and state records	What sources of government records must be searched?	Federal, tribal, state and local government records
Prescriptive	How extensive are historical research requirements?	Left to discretion of environmental professional
1940 or first developed use, whichever is earlier	What is the time frame for historical research?	First developed use
Limited documentation requirements	What if there are data gaps?	More extensive documentation requirements
Left up to environmental professional's discretion	Is it necessary to interview neighboring property owners?	Mandatory at abandoned properties
Must be documented on whether or not performed?	How long is a Phase I report considered valid?	Reports older than one year are invalid

What is important to remember is that the reg-neg committee agreed to allow individuals who do not meet the criteria in Table 3 to perform AAI tasks, provided the work is conducted "under the supervision or responsible charge" of someone who does. In effect, an EP would need to oversee the work, but not necessarily be the one conducting historical research, site visits, interviews or other components of the inquiry. Clearly, experi-

Table 3. Definition of "Environmental Professional":
ASTM E 1527-00 Standard vs. Draft AAI Rule

ASTM E 1527-00 Standard Section 3.3.12 Definitions	Draft AAI Rule §312.10 – Definitions	
A person possessing sufficient training and experience necessary to conduct a site reconnaissance, interviews, and other activities in accordance with this practice, and from the information generated by such activities, having the ability to develop opinions and conclusions regarding recognized environmental conditions in connection with the property in question. An individual's status as an environmental professional may be limited to the type of assessment to be performed or to specific segments of the assessment for which the professional is responsible. ¹	All appropriate inquiry must be undertaken by "an environmental professional, or conducted under the supervision or responsible charge of an environmental professional" defined as: (a) a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding the presence of releases or threatened releases to the surface or subsurface of a property sufficient to meet the objectives and performance factors in §§312.20(d) and (e).	
	(b) In addition, such a person must:	
	Professional/Educational Qualifications	Years of Full-Time Relevant Experience ²
	(1) hold a current professional engineer's or professional geologist's license or registration from a state, tribe, or U.S. territory;	Three (3) years
	OR	
	(2) be licensed or certified by the federal government, a state, tribe or U.S. territory to perform environmental inquiries;	Three (3) years
	OR	
	(3) have a baccalaureate or higher degree from an accredited institution of higher education in a relevant discipline of engineering, environmental science, or earth science;	Five (5) years
	OR	
	promulgation of this rule, have a baccalaureate or higher degree from an accredited institution of higher education;	Ten (10) years
	(c) an environmental professional should remain current in his or her field through participation in continuing education or other activities and should be able to demonstrate such efforts.	
	(d) the definition of "environmental professional" provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in §312.21(b).	
	(e) a person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above.	

TO CONDUCT PISA

(e) a person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above.

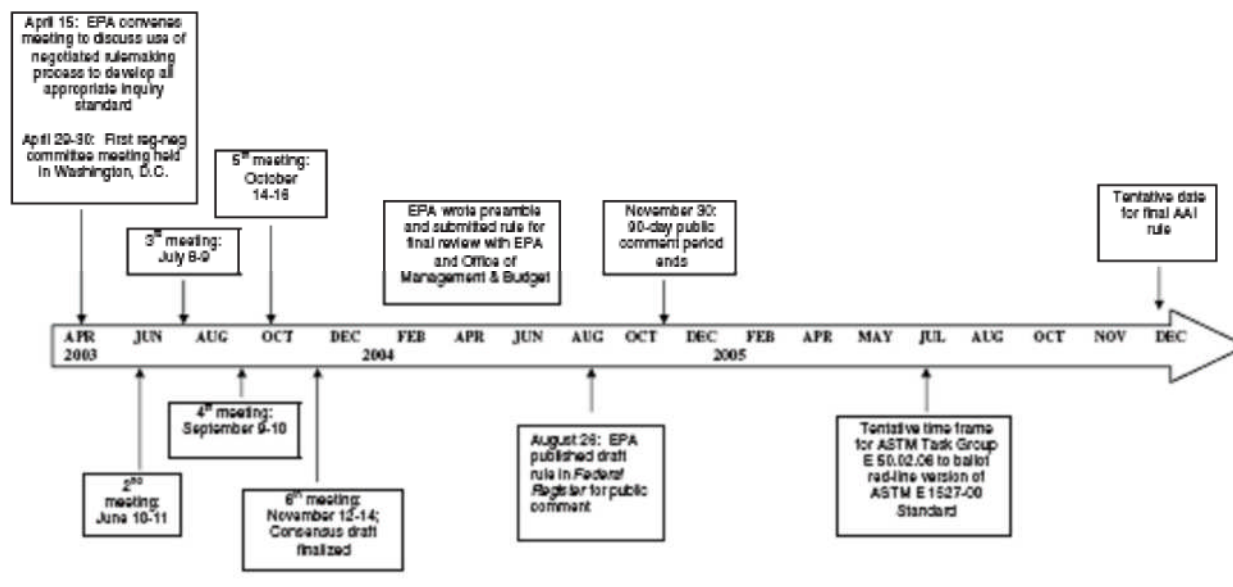
**CURRENT HAZWOPER + 3
YEARS EXPERIENCE CONDUCTING
PHASE 1, ENVIRONMENTAL SITE
ASSESSMENTS.**

Table 4a. Summary of Minimum Search Distances for Federal Records: ASTM E 1527-00 Standard vs. Draft AAI Rule

Database	Target Property	Nearby				References and Notes
		Adjoining (1/8 mile)	1/4 mile	1/2 mile	1 mile	
FEDERAL RECORDS						
NPL Site List						
ASTM	x	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source
AAI	x	x	x	x	x	Section 312.29(b)(2) and (c)(1)(i) (also includes tribal- or state-equivalent NPL sites)
CERCLIS List						
ASTM	x	x	x	x		Section 7.2.1.1 Standard Environmental Record Source
AAI	x	x	x	x		Section 312.29(b)(3)
CERCLIS NFRAP Site List						
ASTM	x	x				Section 7.2.1.1 Standard Environmental Record Source
AAI	x	x	x	x		Section 312.29(c)(2)(iv)
RCRA CORRACTS Facilities List						
ASTM	x	x	x	x	x	Section 7.2.1.1 Standard Environmental Record Source
AAI	x	x	x	x	x	Section 312.29(c)(1)(f) RCRA facilities subject to corrective action
RCRA non-CORRACTS TSD Facilities List						
ASTM	x	x	x	x		Section 7.2.1.1 Standard Environmental Record Source
AAI	x	x				Section 312.29(b)(2)
RCRA Generators List (Small and Large Quantities)						
ASTM	x	x				Section 7.2.1.1 Standard Environmental Record Source
AAI	x	x				Section 312.29(b)(2) and (c)(3)(i)
Delisted NPL						
ASTM	x					Not expressly required; such sites would be considered "historical RECs" on a target property and included in the report as such. Such sites may also be identified through other sources, such as state hazardous waste site lists or in state-equivalent NPL databases.
AAI	x	x	x	x		Section 312.29(c)(2)(i)
Emergency Response Notification System (ERNS) Record						
ASTM	x					Section 7.2.1.1 Standard Environmental Record Source
AAI	x					Section 312.29(b)(5)

ASTM E 1527-00 Standard vs. Draft AAI Rule

	ASTM E1527-00 Standard Section 7.3 <i>Historical Use Information</i>	Draft AAI Rule Section 312.24 <i>Reviews of Historical Sources of Information</i>
How far back must research go?	Uses shall be identified back to "...first developed use or back to 1940, whichever is earlier."	Reviewer must go back as far as "it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes."
Which historical sources must be used?	Specifically identifies eight "standard historical sources" to be reviewed: <ul style="list-style-type: none"> • Aerial Photographs • Fire Insurance Maps • Property Tax Files • Recorded Land Title Records • USGS 7.5 Minute Topographic Maps • Local Street Directories • Building Department Records • Zoning/Land Use Records 	EP's professional judgment determines which specific historical sources are reviewed.
Does a research interval apply?	Review of standard historical sources at less than approximately five-year intervals is not required.	N/A
What if there are still data gaps?	EP to explain the reason for any gaps in the history of the property's use.	EP must: <ol style="list-style-type: none"> (1) identify data gaps; (2) document all sources of information consulted to address such data gaps; and (3) comment upon the significance of such data gaps.



The definition of an environmental professional provided in the final rule differs from the qualifications included in the ASTM E1527-00 standard. Unlike the ASTM E1527-00 standard, the final rule on all appropriate inquiries imposes specific educational, certification or licensing, and relevant experience requirements for the environmental professional tasked with overseeing the assessment. The final rule requires that the environmental professional qualifications be met by the person supervising the conduct of all appropriate inquiries investigation. The environmental professional qualifications under the two standards are summarized in Exhibit 3.

Main Differences	Final AAI Standard	ASTM E1527-00
Definition of Environmental Professional	<ul style="list-style-type: none"> Specific certification/license, education, and experience requirements Applies only to individuals supervising all appropriate inquiries 	<ul style="list-style-type: none"> No specific certification, licensing, education, or experience requirements Applies to all individuals involved in conducting all appropriate inquiries
Interview with Current Owner and Occupants of the Subject Property	Mandatory	A reasonable attempt must be made to interview key site manager and reasonable number of occupants
Interview with Past Owner and Occupants	Interviews with past owners and occupants must be conducted as necessary to achieve the objectives and performance factors in §§ 312.20(e)-(f)	Not required, but must inquire about past uses of the subject property when interviewing current owner and occupants
Interview with Neighboring or Nearby Property Owners or Occupants	Mandatory at abandoned properties	Discretionary
Review of Historical Sources: period to be covered	From the present back to when the property first contained structures or was used for residential, agricultural, commercial, industrial or governmental purposes	All obvious uses from the present back to the property's first obvious developed use or 1940, whichever is earlier
Records of Activity and Use Limitations (e.g., Engineering and Institutional Controls) and Environmental Cleanup Liens	<ul style="list-style-type: none"> No requirement as to who is responsible for the search Scope of environmental cleanup lien search includes those liens filed or recorded under federal, state, tribal or local law 	<ul style="list-style-type: none"> User's responsibility The search results must be reported to the environmental professional Scope of environmental cleanup lien search is limited to reasonably ascertainable land title records
Government Records Review	<ul style="list-style-type: none"> Federal, state, tribal, and local Records 	<ul style="list-style-type: none"> Federal and state records Local records/sources at the discretion of the environmental professional
Site Inspection	<ul style="list-style-type: none"> Visual inspection of subject property and adjoining properties required Limited exemption with specific requirements if the subject property cannot be visually inspected 	<ul style="list-style-type: none"> Visual inspection of subject property required. No exemption. No specific requirement to inspect adjoining properties; only to report anything actually observed
Contaminants of Concern	<u>Parties seeking CERCLA defense:</u> <ul style="list-style-type: none"> CERCLA hazardous substances <u>EPA Brownfields Grant recipients:</u> <ul style="list-style-type: none"> CERCLA hazardous substances, pollutants or contaminants petroleum/petroleum products controlled substances 	CERCLA hazardous substances and petroleum products
Data Gaps	Requires identification of sources consulted to address data gaps and comments on significance of data gap with regard to the ability of the environmental professional to identify conditions indicative of releases and threatened releases	<ul style="list-style-type: none"> Generally discretionary; Sources that revealed no findings must be documented.
Shelf Life of the Written Report	One year, with some updates required after 180 days	Updates of specific activities recommended after 180 days

Shelf Life

The EPA reg-neg committee also wrote language in the draft rule to address an inquiry's shelf life, and the extent to which a property owner can rely on an environmental inquiry prepared for another party. Under Section 312.20(b)(2), the draft AAI rule allows for an inquiry to be transferred from one party to another, allows a previously-completed inquiry to be used and defines the inquiry's shelf life. Both the ASTM E 1527-00 standard and draft AAI rule are consistent in giving certain components of Phase I a six month shelf life. The difference between the two occurs when a Phase I is more than six months old. An AAI inquiry is only valid for up to one year prior to the purchase date of the subject property, and the interviews, searches for environmental cleanup liens, reviews of government records and visual

inspections may not be more than 180 days old. Under ASTM E 1527-00, a Phase I completed more than 180 days previously may be used under Section 4.6 if, at a minimum, a new site visit, interviews, and an update of the records review are performed, and there have been no material changes to the property since the prior ESA was conducted. However, in one important respect, the draft AAI rule is more stringent than ASTM E 1527-00. A five-year old Phase I ESA report could still be used under ASTM E 1527-00 if updates of certain components are made, but under the draft AAI rule, if the assessment is more than one year old, all elements must be updated.

VIDEO

LOG

REVIEW

Report Manager - Microsoft Internet Explorer provided by ADOT

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State Route 77 (NB)@ M069 .8800

Fastest
Fast
Normal
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Slowest



2005-04-14

Year
2005

Route
State Route 77 (NB)

Route Features

- M Low
- Interstate 10 Frontage (EB)
- M068.05 (I-10 NB in Tucson)
- Interstate 10 (EB)
- Interstate 10 (WB)
- Interstate 10 Frontage (WB)
- Flowing Wells Rd
- El Burrito Ave
- M069
- Fairview Ave
- Glaris Ave
- 15th Ave
- 14th Ave
- Oracle Rd nonCard
- Blacklidge Dr
- Delano St
- Fort Lowell Rd
- Navajo Rd

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Intersecting Routes With Photos

- Interstate 10 (EB)
- Interstate 10 (WB)
- State Route 989 (NB)
- State Route 79 (SB)
- State Route 177 (SB)
- US Highway 70 (WB)
- State Route 277 (NB)
- State Route 377 (SB)
- US Highway 180 (EB)
- Interstate 40 (EB)
- Interstate 40 (WB)

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OLD

VIDEO

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REVIEW

**JUST IMAGINE THIS IS A BEAUTIFUL
NEW, 1970s MOBIL GAS STATION ON
THE ROADSIDE OF US 60 AT MP 213.50.**



!

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**OLD AND
NEW VIDEO
LOG AVAILABLE
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YOU SUPPLY
A LARGE
PORTABLE
HARD DRIVE**

DEFINED “PHASE I” SCOPES

ADOT has determined that the level of effort required to satisfy the PISA requirement falls into one of three categories. The three categories, describing increasing levels-of-effort, are provided below. These categories are followed by a description of three “triggers”, or major conditions, that should be considered in choosing the classification. The three categories and three triggers are the same ones used on the SCAPEGOAT checklist.

SCOPE 1 – Video Log Review Only (**VLR**)

ADOT maintains a Video Log of every mile of State and Federal highway in the state of Arizona, updated annually. ADOT provides free access to this resource to all consultants, and also offers the video log for restricted sale for contractors to use on ADOT projects. The video log is a valuable tool for prescreening projects prior to scoping, and for performing virtual corridor tours for a variety of purposes. For the hazmat assessment purpose, the video log may be used to preview the project corridor for the location of potential hazardous materials sites and general characterization of land use. For many projects, the video log review alone is adequate to make a determination whether further hazardous materials assessment should be performed.

EXAMPLE: the video log reveals that the project is located on an isolated, undeveloped stretch of rural highway with no site development of any kind adjacent to the right of way. With review by an appropriately qualified hazardous materials specialist, general comments can be made as to the low probability of hazardous materials impacts in such a setting. If the project doesn't involve any of the triggers, this level of effort could be adequate for this type of project. The Scope 1 level of effort would be completed prior to the cost estimate submittal, and could constitute the hazmat review for the project.

SCOPE 2 – Video Log Review + Environmental Records Search (**VLR+**)

This scope includes the video log review described in Scope 1, plus ordering and review of an environmental records search, typically using a subcontracted database services provider such as EDR, Vista, or All Lands Title. If the Scope 1 review identifies areas of concern that the assessor believes would warrant a review of specific regulatory records, this step could be added. The addition of the records review provides data on hazardous materials sites that are known to exist and listed on state and federal databases. The Scope 2 level of effort would be included in the cost estimate for the project, and would be commenced upon Notice to Proceed from ADOT.

SCOPE 3 – Preliminary Initial Site Assessment (**PISA**)

This is the scope of work that has commonly been expected for every project by ADOT in the past. It includes a records review, possibly a video log review, and a reconnaissance (field review) of the project site by a qualified assessor (trained in hazardous materials issues and approved by ADOT). This scope of work provides a snapshot-in-time of the physical conditions of a corridor, with the additional knowledge of known, listed sites. The assessor can look for physical signs of hazardous materials releases, field-verify site locations listed in the records search, and make judgments as to the likelihood of impacts affecting the project corridor based on distances, project scope, etc. This scope also provides the most up-to-date information, since the video log is only shot periodically for a given area. A summary of the findings of the PISA would be prepared in a brief report that would include the records review, photographs, figures including tabular information on sites of concern, and findings and recommendations of the assessor.

SUMMARY

This protocol for deciding level of effort is measured (provides incremental level-of-effort), portable (can be used by other consultants), and defensible (follows elements of the ASTM method, increasingly as you move closer to the full ISA). The checklist provided as Attachment A can be easily attached to ADOT's Project Data Sheet as justification for the level of effort. As more planners see the form and the justification logic, they will accept the format and the idea that there is a range of effort (and cost) for the hazmat assessment task. ADOT will benefit by all consultants moving toward this type of modular approach and provide hazmat assessments that are more appropriately scoped based on the specifics of a project.

SCAPEGOAT

SCOPING CHECKLIST / ASSESSMENT PROTOCOL / ENVIRONMENTAL GROUP / OTHER APPROVAL TOOL

To be used for determining appropriate level -of - effort for hazmat investigation

TRIGGERS:

1) R/W Acquisition? Yes____ No____ Details:

2) Ground disturbance? Yes____ No____ Details:

3) Development density? Details (type of development, location, etc.):

LEVEL OF EFFORT:

VLR _____ Justification:

VLR+ _____ Justification:

PISA _____ Justification:

ISA _____ Justification:

Comments:

On -Call QHA Signature / Date: _____

On -Call NEPA Planner Signature / Date: _____

ADOT NEPA Planner Signature / Date: _____